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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

NO. 359

COMMONWEALTH OF PENNSYLVANIA, ex rel.
CLARENCE E. TANNER, Petitioner,

v.

JOHN W. CLAUDY, Warden, Western State
Penitentiary, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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JOHN W. CLAUDY, Warden, Western State Penitentiary, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Clarence E. Tanner, respectfully prays that a writ of certiorari issue to review the decision and judgment of the Supreme Court of Pennsylvania entered June 28, 1954.

I.

OPINION BELOW

The Opinion of the Supreme Court of Pennsylvania (App. 14) is reported in 378 Pa. 429.

II.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania (App. 14) was filed and entered on June 28, 1954. The jurisdiction of this Court is involved under 28 U. S. C. Sec. 1257 (3) 1948. The Petition is filed in time under 28 U.S.C. Sec. 2101 (c).

III.

QUESTIONS PRESENTED

1. Where the record in a capital case does not affirmatively show that the defendant was present at the time sentence was imposed, was the sentencing court without jurisdiction, thus entitling defendant to release on Writ of Habeas Corpus?

2. Can the record of a trial court of Oyer and Terminer be collaterally attacked and amended, particularly by contradicted parole evidence, in a habeas corpus proceeding in a Common Pleas Court?

IV.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision which the case involves is the 14th Amendment to the Constitution of the United States, which provides:

> "Nor shall any state deprive any person of life, liberty or property without due process of law."

V.

STATEMENT OF THE CASE

The Petitioner, Clarence E. Tanner, filed a Petition for Writ of Habeas Corpus on May 27, 1952, in the Common Pleas Court of Allegheny County, Pennsylvania, at No. 1916 July Term, 1952, alleging that he is being illegally held in the Western State Penitentiary, situated in Allegheny County, Pennsylvania, in violation of his constitutional rights, and in violation of the Constitution of the United States, for the reason that Petitioner was not present, and that the record at No. 45 June Sessions, 1945, Court of Oyer and Terminer of Allegheny County, Pennsylvania, does not affirmatively show that he was present, in court, when a life sentence was imposed by the Judge, the late Honorable James L. O'Toole, on May 23, 1946.

Petitioner had been convicted on October 23, 1945, by a Jury of the charge of first degree murder with life imprisonment. A motion for New Trial was filed by Petitioner October 24, 1945, and refused on May 14, 1946. On June 12, 1952, the District Attorney of Allegheny County filed an Answer to the Petition for Writ of Habeas Corpus, admitting that the record at said No. 45 June Sessions, 1945, Court of Oyer and Terminer, did not and does not affirmatively show the presence of the Petitioner at the time of sentence, but the District Attorney averred that the Petitioner was present and that the failure of the record to show his presence was merely a clerical error. The District Attorney's Answer admitted that, if the Petitioner was not present, his constitutional rights were violated.

A Rule to Show Cause was granted on the Petition for Writ of Habeas Corpus, and a hearing was held June 16, 1952, on said Petition and Answer in said Court of Common Pleas before the Honorable Walter P. Smart, at which hearing testimony was taken.

The Petitioner introduced the record of his trial at said 45 June Sessions, 1945, Court of Oyer and Terminer, which did not show that the Petitioner was present at the time of sentence. The Petitioner also testified that he was not present when sentence was imposed. He said he did not remember whether he had been taken over to the courthouse the morning he was sent to the Penitentiary, but that he had been taken to the Penitentiary from the County Jail and not from the courthouse. The testimony of Keeper Clerk Kirby of the County Jail, a witness called by the District Attorney, corroborated Petitioner's testimony that he was taken to the Penitentiary from the Jail and Mr. Kirby admitted that his records would not indicate whether or not the prisoner was actually taken to a court, when he was over in the courthouse.

The District Attorney offered parole evidence to attempt to prove that the Petitioner had been present at the time of sentence, thus attempting to attack the record at said 45 June Sessions, 1945, of the Court of Oyer and Terminer, and to amend said record in this collateral proceeding. Petitioner objected to said parole evidence, but the objection was overruled and exception noted.

The District Attorney called Adam B. Shaffer, who was a member of the Bar at the time he testified; and, who had been Petitioner's Counsel in the homicide case

in the Court of Oyer and Terminer. Mr. Shaffer admitted in his testimony that he did not recall whether or not he and the Petitioner were present at the time of sentence, when Petitioner's present counsel first asked him about the matter; but claimed that his memory was later refreshed by recalling a conversation with Petitioner's mother on the day of sentence. In rebuttal, Julia Tanner, Petitioner's mother, flatly contradicted Mr. Shaffer and stated that she had not been in court after the verdict was rendered by the Jury, because she suffered a heart attack at that time.

Former Assistant District Attorney William H. Colvin testified that he recalled that Petitioner was present when he was sentenced, but gave no reason for his recollection.

No amendment or change of the record at 45 June Sessions, 1945, Court of Oyer and Terminer, has been made, nor has Petitioner received any notice of any intention to amend said record or of any Motion to Correct or Amend said record.

On January 18, 1945, Honorable Walter P. Smart, made an order at said No. 1916 July Term, 1952, in the Court of Common Pleas of Allegheny County, refusing the Petition for Writ of Habeas Corpus.

An appeal was taken by Petitioner to the Supreme Court of Pennsylvania on February 4, 1954, which Court affirmed the Order of the Court of Common Pleas of Allegheny County.

The Federal questions sought to be reviewed, to-wit, the Petitioner's rights under the Constitution of the United States, were raised in the Court of Common Pleas of Allegheny County, Pennsylvania, the court of first in-

stance, by the original pleading filed in the case—Petitioner's Petition for Writ of Habeas Corpus. (Record Pages 3a, 4a, and 5a). Assignments of Error being abolished in the appellate court, the Supreme Court of Pennsylvania, the federal questions sought to be reviewed were raised by the appeal from the Order of the Court of Common Pleas refusing the Petition for Habeas Corpus.

The Common Pleas Court passed upon the federal questions sought to be reviewed by its Opinion and Order refusing the Petition for Habeas Corpus and exception noted. (Record Pages 47a, 48a, 49a and 50a)

The Supreme Court of Pennsylvania passed upon the federal questions sought to be reviewed by its Opinion affirming the Order of the Court of Common Pleas refusing the Petition for Writ of Habeas Corpus. (App. 14-22).

VI.

REASONS FOR GRANTING THE WRIT

The Supreme Court of Pennsylvania has decided a question under the Fourteenth Amendment to the Constitution of the United States in a way that is not in accord with applicable decisions of this Court.

1. The decision of the Supreme Court of Pennsylvania is in conflict with a decision of this Court in *Hill v. United States ex rel. Wampler,* 56 S. Ct. 760; 298 U. S. 460.

The only sentence known to law of a court of record is the sentence or judgment that is entered on records of such court. Until corrected in a direct proceeding, it says what it was meant to say, and this by an irrebuttable presumption.

The Supreme Court in their Opinion in the instant case said, "Although the fact of presence was denied, the contrary was conclusively established and, therefore, *with the record corrected, as it can be, by the court imposing the sentence, the writ must be denied.* (Italics supplied). Justice Musmanno of the Supreme Court of Pennsylvania in his dissenting Opinion in the instant case said, "There is a notation to the effect that a sentence was imposed on Clarence E. Tanner, but there is no indication that this Clarence E. Tanner was present to receive the sentence. If in fact he was not present when sentence was passed, his current confinement is illegal * * * *Tanner's fate is written in the records of the criminal courts and not in the civil courts of Allegheny County. Those records of the criminal courts*

show that he is being held in prison illegally, and thus the matter stands at this very moment. (Italics Supplied)

"As recently as April 22, 1952, this Court, speaking through Mr. Justice Bell, categorically stated:

> 'The law is clearly settled as stated by Chief Justice Maxey in Commonwealth v. Johnson, 348 Pa., 349, 35 A. 2d 212: 'The Principle has long been established in our criminal jurisprudence that *in capital cases the record must show that the prisoner was present at the trial, verdict and at the passing of the sentence*: Dunn v. Com., 6 Pa., 384. * * * This principle was reiterated in Com. v. Silcox, 161 Pa., 484, 496, 29 A. 105, where we said: 'In capital cases the record *must show affirmatively* that the prisoner was present *at every stage* of the proceedings against him.' We must, therefore, examine the record to determine whether it affirmativly shows that the prisoner was present at the arraignment, trial, verdict, *sentence,* and at every stage of the proceedings against him.' (Emphasis supplied)

"In the *Johnson* case referred to by Mr. Justice Bell, Chief Justice Maxey referred to the case of *Dunn v. Com.,* 6 Pa., 384, and said:

> 'What was said by this Court in that case is applicable here. "This (case) presents a state of confusion and uncertainty in the record which cannot be relieved by any justifiable presumption, in a case involving the life of a fellow-being." '

"The case at bar has fallen into the state of confusion and uncertainty referred to in the Dunn case.

"In the Johnson case, Chief Justice Maxey quoted from *Reagen et ux. v. Reading Co.*, 126 Pa. Superior Ct. 175, 184, 190 A. 412: where it was said: 'We can look only to the record in this case * * * and we cannot permit conjecture to supply what the evidence does not contain.'

"Looking at the records in the Oyer and Terminer Court in the case at bar, one can only conjecture that the defendant must have been present when the judge pronounced sentence. The affirmance of that conjecture by the Court of Common Pleas, and the imprimatur of this Court of conjecture, does not place it on any higher level of juridic reliability than *conjecture.*"

In the instant case, the District Attorney seeks to collaterally attack the record of the Court of Oyer and Terminer in a habeas corpus proceedings in the Court of Common Pleas. It was improper for the lower court to receive any testimony which would even tend to dispute the verity of the records of the other court.

If there were a clerical omission in the record at 45 June Sessions, 1945, it would appear that the proper methods of correcting it would have been by a Motion to Correct and or Amend the record directed to the court of Oyer and Terminer of Allegheny County where the "mistake" is alleged to have been made; or by a timely order of amendment by the trial judge himself if the omission was a clerical error rather than a correct statement of fact.

No attempt has ever been made in the Court of Oyer and Terminer to allege or correct any clerical error in the proceedings at 45 June Sessions, 1945.

In the following cases where correction or amendment was allowed, the trial court was the forum making the correction.

In *Commonwealth v. Silcox,* 161 Pa. 484, 29 A. 105, which was an appeal from a conviction of murder, and not a collateral proceeding, the defendant himself did not deny that he was present. In the Silcox case, the Supreme Court of Pennsylvania found that the amendment "which made the record conform to the fact" was proper where the President Judge who had tried the case and the associate Judges of the same court had certified that defendant was present and ordered the clerk to amend and correct the minutes.

In *Johnson v. Commonwealth,* 115 Pa. 369, 9 A. 78, where the Supreme Court approved the correction of a mere clerical error as to the defendant's presence, it was ordered by the trial judge who had personal knowledge of the defendant's presence and the order was made during the term of court at which sentence was pronounced. The Supreme Court of Pennsylvania said on Page 397:

> "If the correction had not been thus made, the defect would have been fatal."

And in *Commonwealth v. Rusic,* 229 Pa. 587, 79 A. 140, although the amendment of the record was made after the term, it was made by the trial court himself.

Even the trial court is limited to a certain extent in changing the record. In *Commonwealth v. Mount,* 172 Pa. Super. 258, 93 A. 2d 887, where the lower court's refusal to correct the docket entries in an Armed Robbery case was affirmed, the Superior Court recognized the well

settled principle that clerical errors or inaccuracies may be corrected by the trial court so that they conform to the facts, but cautioned that even the trial court should use extreme care in correcting records after the passage of many years.

Even if the Common Pleas Court had the power to amend the record of the Court of Oyer and Terminer in a collateral proceeding, the record should not be amended on parole testimony so vague and contradicted as the testimony in the instant case. The testimony is unsubstantiated by any written memorandum, judicial or quasi-judicial. For example, if the defendant had been present, would not the stenographer's notes show what took place at the time of sentence. Those notes are also barren of any reference to the defndant's being present at the time of sentence.

In *Commonwealth ex rel. Kaylor v. Ashe,* 167 Pa. Super. 263 (1950), where the record recited that the defendant was present during the selection of the jury, the Superior Court of Pennsylvania held that the record could not be impeached collaterally in a habeas corpus proceeding by affidavits, etc., showing that the defendant was actually not present.

We presume that the above principle works both ways, and that the District Attorney cannot impeach the record by parole evidence any more than the defendant can. We do not have to base our contention on presumption alone in regard to that point, however. The Supreme Court of Pennsylvania ruled on the weight of the record as far back as *Doebler v. Commonwealth,* 3 Serg. & Rawle 237, where the court reversed a judgment because it did

not appear from the record, that twelve jurors were sworn, although testimony revealed that a drunken juror had been removed and a substitution made, where it was not noted on the record.

2. The decision of the Supreme Court of Pennsylvania in the instant case is in conflict with a decision of this Court in *Riddle v. Dyche,* 43 S. Ct. 555, 62 U. S., 333, where a relator in a habeas corpus case sought to prove that only 11 jurors were sworn in at his trial, while the record showed that 12 jurors had been sworn. This Court refused to allow such record to be attacked in a collateral proceeding.

3. The decision of the Supreme Court of Pennsylvania in the instant case is in conflict with a decision of this Court in *Johnson v. Zerbst,* 58 S. Ct. 1019, 304 U. S. 458.

A court's jurisdiction at the beginning of the trial may be lost in the course of the proceedings. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus.

The Supreme Court of Pennsylvania in the instant case concedes that the law of Pennsylvania is "that it is the inherent right of the prisoner in a capital case to be present at every stage of the proceedings and neither court nor judge can take any step affecting his right in his absence."

The Petitioner is being illegally detained and is being deprived of his life, liberty and property without due process of law in violation of the Fourteenth Amendment

to the Constitution of the United States. The Petition for Writ of Habeas Corpus should have been granted and the conviction and sentence at No. 45 June Sessions in the Court of Oyer and Terminer should have been declared illegal and Petitioner discharged from his present imprisonment and remanded to answer the indictment returned against him at said number and term of said Court.

VII.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a writ of certiorari should be granted.

Respectfully submitted

CLARENCE E. TANNER
Petitioner

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APPENDIX

(95)

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA ex rel. CLARENCE E. TANNER, Appellant v. JOHN W. CLAUDY, Warden, Western State Penitentiary	No. 134 March Term, 1954. Appeal from the Order of the Court of Common Pleas of Allegheny County at No. 1916 July Term, 1952.

Opinion.

Filed: June 28, 1954.

ARNOLD, J.

Relator appeals from an order denying his petition for writ of habeas corpus. He has heretofore been denied an application filed on other grounds: Commonwealth ex rel. Tanner v. Ashe, 365 Pa. 419, 76 A. 2d 210. His present petition was based on allegations that he was not, and that the record did not affirmatively show that he was present when sentenced on May 23, 1946, to life imprisonment, upon conviction of murder in the first degree. In its answer the Commonwealth admitted that the record had no entry showing he was present, but alleged that he was *actually present,* and that the omission to note his presence in the record was a clerical error.

Appendix.

At hearing the Commonwealth conclusively established, by testimony of relator's counsel in the murder trial and of the prosecutor in that trial, that he was actually present with his counsel when sentence was pronounced. This testimony was fortified by records of the county jail (where he was held until sentence) showing that on May 23, 1946, he was taken to the court house at 9:00 A. M., was returned at noon, and was sent to the penitentiary on the same day to serve his sentence.

Thus, the sole question is whether even though he was actually present, the absence of a notation to that effect in the record is sufficient grounds for issuance of the writ. We think not.

It is well recognized that the courts have the power to correct clerical errors in the record: Commonwealth v. Mount, 172 Pa. Superior Ct. 258, 262, 93 A. 2d 887; Commonwealth v. Meyer, 169 Pa. Superior Ct. 40, 43, 82 A. 2d 298; Commonwealth v. Rusic, 229 Pa. 587, 591, 79 A. 140. So that no practical or procedural difficulties are presented on this aspect of the matter. It is also true that " 'It is the inherent right of the prisoner in a capital case to be present at every stage of the proceedings' " and " 'neither court nor judge can take any step affecting his right in his absence' ": Commonwealth v. Johnson, 348 Pa. 349, 352, 35 A. 2d 312. Yet, in no case where the prisoner was present did this Court issue a writ or set aside the sentence merely because of a clerical omission to note his presence in the record. On the contrary, the sentence, and the right of the court to correct the record to show the prisoner's presence, were upheld in Commonwealth v. Silcox, 161 Pa. 484, 29 A. 105,[1] where this Court

1. Cited with approval in Commonwealth v. Johnson, 348 Pa. 349, 35 A. 2d 312.

stated at page 496: "The first specification complains that the record prior to the amendment * * * did not show the presence of the defendant at every stage of the proceedings which resulted in his conviction. That he was present during the trial and when the sentence was pronounced, and that full opportunity for the exercise of all his rights in relation to both was accorded to him, is not denied. The specification therefore rests on the common law doctrine that in capital cases the record must show affirmatively that the prisoner was present at every stage of the proceedings against him. *The contention of the defendant based thereon is that although he was actually present he is entitled to a new trial because the clerk neglected to note his presence on the record. In the light of the undisputed facts there is no real merit in this contention; it is purely technical and it ought not to prevail unless the amendment which made the record conform to the fact was unauthorized. We think the amendment was clearly within and a proper exercise of the power of the court. It simply supplied a clerical omission and placed the record in this particular in harmony with the fact. It excluded the possbiility of an inference from the record opposed to the truth of the case, but it did not deprive the defendant of any substantial right. What right had he to require that a defect in the record arising from an oversight of the clerk in keeping it and which left room for an inference hostile to the undisputed facts, should be perpetuated for his benefit? He neither lost nor acquired anything by the defect which prevented the correction of it in accordance with these facts.*" (Italics supplied). This controls the present case. Although the fact of presence was denied, the contrary was conclusively established and therefore

with the record corrected, as it can be, by the court imposing the sentence, the writ must be denied. To rule otherwise would be against common sense, justice and established law. See also Commonwealth ex rel. Wing v. Claudy, 370 Pa. 366, 88 A. 2d 84.

Order affirmed.

Dissenting opinion filed by Mr. Justice Musmanno.

Concurring opinion filed by Mr. Justice Bell.

Concurring Opinion.

Filed: June 28, 1954

BELL, J.

This Court sustained the Order of the Court of Common Pleas of Allegheny County which denied relator's petition for a writ of habeas corpus. The record in the Court of Oyer and Terminer of Allegheny County where relator was tried and convicted of murder in the first degree and sentenced to life imprisonment, did not *affirmatively* show that he was actually present when sentence was pronounced. However, the Court of Common Pleas, after a hearing, found that he was actually present when sentence was pronounced, and that the omission to note his presence in the records of the sentencing Court was a clerical error.

The majority opinion affirming the dismissal of the writ of habeas corpus is in accord with justice, but not in accord with the prior decisions of this Court. As Mr. Justice MUSMANNO clearly points out in his dissenting opinion, this Court has held from *Dunn v. Commonwealth*, 6 Pa. 384, through many cases including *Commonwealth*

v. Silcox, 161 Pa. 484, 29 A. 105, *Commonwealth v. Johnson,* 348 Pa. 349, 35 A. 2d 312, and *Commonwealth ex rel. Wing v. Claudy,* 370 Pa. 366, 88 A. 2d 84, that: "In capital cases the record must show affirmatively that the prisoner was present at the arraignment, trial, verdict, sentence and at every stage of the proceedings against him." It is undisputed that the record in the Court of Oyer and Terminer fails to affirmatively show these facts.

"There can be no doubt of the power of the court to amend its record [to show the presence of the defendant in Court when sentence was imposed upon him] so as to make it conform to the truth even after the term has expired:" *Commonwealth v. Rusic,* 229 Pa. 587, 591, 79 A. 140; also *Commonwealth v. Silcox,* 161 Pa. 484, 496, 29 A. 105; *Commonwealth v. Mount,* 172 Pa. Superior Ct. 258, 262, 93 A. 2d 887; *Commonwealth v. Mayer,* 169 Pa. Superior Ct. 40, 43, 82 A. 2d 298. However, we know of no case and we have been referred to none which authorizes a Court of Common Pleas to correct errors or amend the record of a Court of Oyer and Terminer or Quarter Sessions, and we do not believe that a Court of Common Pleas has or should have such power. Yet that is the effect, if not the direct holding, of the majority opinion.

The difficulty in this case is increased by one provision in the recent salutary Act of May 25, 1951, P. L. 415, §1, 12 PS 1901, 1902, *et seq.* It provides in effect that writs of habeas corpus by persons accused or convicted of crime be presented to a Court of Common Pleas instead of to the criminal Court which imposed the sentence (or in which the accused is to be tried). The latter practice has been followed in Philadelphia County since the Act of April 4, 1837, P. L. 377, §2, 17 PS 502, and likewise pre-

vails in the Federal Courts: see U.S. Code Annotated Title 28, Judiciary, and Judicial Procedure, §2255, pages 762-763. If the petition for the writ could have been presented to the sentencing Court, that Court could have corrected its records and the petition could then have been properly dismissed: *Commonwealth v. Rusic,* 229 Pa., *supra,* and cases hereinabove cited.

It is ridiculous that a clerk's clerical omission should be sufficient ground to set a murderer free—such a principle would produce a miscarriage of justice.

If habeas corpus is to be exclusively a civil remedy available only in Common Pleas or other civil Courts, then we should modify our prior decisions, and in the interest of justice and for the protection of the accused and of the public alike hold that in capital cases the record in the trial or sentencing Court, or the record in the Court where a petition for a writ of habeas corpus is presented, or both of them taken together and including all amendments which are proper and necessary, must show that the prisoner was present at the arraignment, trial, verdict, sentencing, and at every stage of the proceedings against him.

For the reasons and on the basis above mentioned, I concur with the Opinion of the Court.

Dissenting Opinion.

Filed: June 28, 1954

MUSMANNO, J.

I do not find any authority for the correction by one court of an error in the records of a totally different court. The relator Clarence E. Tanner was tried in the Court of Oyer and Terminer of Allegheny County. Following that trial he was sent to the Western Penitentiary. The natural assumption would be that, some time prior to his removal to the penitentiary, he must have been duly sentenced by a judge. The records in the Oyer and Terminer Court, however, do not show that to be a fact. There is a notation to the effect that a sentence was imposed on Clarence E. Tanner, but there is no indication that this Clarence E. Tanner was present to receive the sentence. If in fact he was not present when sentence was passed, his current confinement in Western Pennsylvania is illegal. If he was present at the time of sentencing, and that can be shown properly, a correction must be made in the records in the Court of Oyer and Terminer of Allegheny County. This has not been done. I do not believe that these present proceedings settle the matter and I have no doubt that when Tanner finds time hanging heavy on his hands in the penitentiary, which could be almost any day, he will fashion another petition for a writ of habeas corpus, pointing to the undeniable fact that the records of the Oyer and Terminer Court still have him absent at the time of sentencing and demanding that upon that showing he be released.

At a hearing in the Court of Common Pleas, oral testimony was received to the effect that Tanner was actually in Court when the sentence was passed. The

defendant himself flatly denied this representation. On this disputed testimony the Court of Common Pleas came to the conclusion that the defendant must have been present at the time of sentencing and thus denied the writ. This Court affirms the decision of the Court of Common Pleas but the void in the records of the Court of Oyer & Terminer still remains. The decision of the Court of Common Pleas in this matter was utterly nugatory and this Court has affirmed a vacuum. Tanner's fate is written in the records of the criminal courts and not in the civil courts of Allegheny County. Those records of the criminal courts show that he is being held in prison illegally, and thus the matter stands at this very moment.

As recently as April 22, 1952, this Court, speaking through Mr. Justice Bell, categorically stated:

> "The law is clearly settled as stated by Chief Justice Maxey in Commonwealth v. Johnson, 348 Pa., 349, 35 A. 2d 212: 'The principle has long been established in our criminal jurisprudence that *in capital cases the record must show that the prisoner was present at the trial, verdict and at the passing of the sentence*: Dunn v. Co., 6 Pa., 380 * * *. This principle was reiterated in Com. v. Silcox, 161 Pa., 484, 496, 29 A. 105, where we said: 'In capital cases the record *must show affirmatively* that the prisoner was present *at every stage* of the proceedings against him.' We must, therefore, examine the record to determine whether it affirmatively shows that the prisoner was present at the arraignment, trial, verdict, *sentence,* and at every stage of the proceedings against him." (Emphasis supplied.)

In the *Johnson* case referred to by Mr. Justice Bell, Chief Justice Maxey referred to the case of Dunn v. Com., 6 Pa., 384, and said:

> "What was said by this Court in that case is applicable here. 'This (case) presents a state of confusion and uncertainty in the record which cannot be relieved by any justifiable presumption, in a case involving the life of a fellow-being.' "

The case at bar has fallen into the state of confusion and uncertainty referred to in the Dunn case.

In the Johnson case, Chief Justice Maxey quoted from *Reagen et ux. v. Reading Co.*, 126 Pa. Superior Ct. 175, 184, 190 A. 412: where it was said: "We can look only to the record in this case * * * and we cannot permit conjecture to supply what the evidence does not contain."

Looking at the records in the Oyer and Terminer Court in the case at bar, one can only conjecture that the defendant must have been present when the judge pronounced sentence. The affirmance of that conjecture by the Court of Common Pleas, and the imprimatur of this Court of conjecture, does not place it on any higher level of juridic reliability than *conjecture.*